

ISSUED DECEMBER 18, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA

NIGHTLIFE VENTURES, INC.	)	AB-6618
dba The Probe)	
834-36 North Highland Avenue	)	File: 57/58-145876
Los Angeles, CA 90038,	)	Reg: 95032467
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Ronald M. Gruen
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	August 7, 1996
	)	Los Angeles, CA
)	

Nightlife Ventures, Inc., doing business as The Probe (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended appellant's license for 20 days, with 10 days stayed pending a one-year probationary period, for permitting the entry of and the sale of beer to a person who was neither a bona fide member of the club nor the bona fide guest of a member of the club, being contrary to the universal and generic public welfare and morals provisions of the California

¹The decision of the Department dated December 7, 1995, is set forth in the appendix.

Constitution, article XX, §22, arising from violations of Business and Professions Code² §§23431, 23804, and 24200, subdivision (a).

Appearances on appeal include appellant Nightlife Ventures, Inc., appearing through its president, Mark Hundahl, and its counsel, Andreas Birgel, Jr.; and the Department of Alcoholic Beverage Control, appearing through its counsel, John P. McCarthy.

FACTS AND PROCEDURAL HISTORY

Appellant's Special On-Sale General license was issued on December 29, 1983. Thereafter, the Department instituted an accusation on April 13, 1995, alleging that appellant permitted the entry of and the sale of beer to a person who was neither a bona fide member of the club nor the bona fide guest of a member of the club, contrary to the statutory and license conditions to which it was subject.

An administrative hearing was held on October 27, 1995, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the entry of and sale of beer to investigator Musselman. Subsequent to the hearing, the Department issued its decision which determined that Musselman was neither a bona fide member of the club nor a bona fide guest of a member of the club, and imposed a suspension of 20 days, with 10 days stayed for a probationary period of one year.

²Unless otherwise noted, references to code sections hereinafter are to sections of the Business and Professions Code.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the findings are not supported by substantial evidence; (2) the Department has exceeded its authority by considering statutes not included in the Accusation as having been violated; and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends that the findings are not supported by substantial evidence in the record, since the findings "are not reasonable in nature, credible, of solid value, and that reasonably inspires confidence." (App. Opening Brief 6.) "Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477, [95 L.Ed. 456, 71 S.Ct. 456], and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve conflicts of evidence in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kruse

v. Bank of America (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 217]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666, 670]; see Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]--a case where there was substantial evidence supporting the Department's as well as the license-applicant's position.)

On November 5, 1994, investigator Musselman went to the premises, paid \$10.00, was issued a "membership card," entered the premises and purchased an alcoholic beverage. Later, the investigator "inadvertently discarded" the card [RT 12, 14]. On December 1, 1994, when Musselman went again to the premises, accompanied by investigator Wong, he was not asked if he was a member, and he only paid \$5.00 to enter the premises [RT 24-25]. On January 20, 1995, Musselman again went to appellant's premises. This time he was asked if he was a member, and he said "no." He then paid \$10.00 and was given a "membership card," different from the one he had received on his first visit to the premises [RT 32-34, 63]. On none of these occasions was he asked to fill out a membership application or to do anything more than pay a fee and show his identification, the information from which was not recorded in any way by appellant's employees [RT 17, 25, 35-36, 58, 66, 70-71].

Appellant holds a Special On-Sale General license under §23399.2,³ allowing it to operate as a club. Section 23431 provides that "The holder of a club license may exercise all of the rights and privileges permitted by an on-sale general license but may

³The text of this statute is set out in the appendix.

sell and serve alcoholic beverages for consumption within the licensed establishment only to bona fide members of the club and their bona fide guests.” “Member” is not defined by statute or rule, but “guest” is defined in §23037⁴ as “a person who is actually a houseguest, or a person whose presence as a guest is in response to a specific invitation for the special occasion.”

Appellant argues that there is no substantial evidence to support the findings that §§23431 and 23804 were violated since Musselman was, in fact, a bona fide member after he received the membership card in November that he later discarded. Appellant suggests that Musselman paid only half as much in December because he was already a member. Appellant appears to argue that in his January visit, Musselman became a member again when he paid \$10.00 and received a new membership card.

The Department argues that, to be a bona fide member, a person’s name must appear on the membership list that a club is required by §23037 to have. Musselman’s name cannot have been on any membership list because he never filled out an application or even provided his name for a list, so, the Department concludes, Musselman cannot have been a member, even if he received a membership card. In addition, the Department argues, a person must have to do something more than simply pay money at the door to become a bona fide member. Otherwise, there would be nothing to distinguish a private club from a public establishment.

⁴The text of this statute is set out in the appendix.

Although there is no statutory or regulatory definition of "member," it is clear that one has to do more to become a member of a club than to show up at the door and pay money. This is nothing more than the payment of a "cover charge" which allows entrance to a public premises.

The "membership card" issued by appellant does not convert a cover charge into a membership fee, since there was no requirement that one sign the card or otherwise have it distinguished as one's own. Therefore, these cards have no persuasive value.

Appellant has not disputed the facts themselves, except to say that the discard of the membership card that Musselman received on his first visit "is neither reasonable in nature, credible, of solid value, nor does it reasonably inspire confidence." (App. Opening Brief 7.) Appellant's counsel suggests several alternative explanations or interpretations of the facts that are more favorable to appellant than those used by the Department. However, this Board must draw all inferences in favor of the Department.

We conclude that there is substantial evidence to support the findings of the Department.

II

Appellant contends that the Department exceeded its authority and violated Government Code § 11503⁵ by considering the requirements of Business and Professions Code §§ 23399.2 and 23037 in its Conclusion of Law when those sections were not referred to in the Accusation. Appellant contends that it was prejudiced,

⁵The text of this statute is set out in the appendix.

since it had no notice that it needed to present a defense with regard to these sections. Even if these sections were properly raised and applied, appellant argues, there is no substantial evidence to support the Department's Conclusion of Law.

The Department's Accusation alleged violations of §§23431 and 23804,⁶ but the Administrative Law Judge (ALJ) included a section in his Proposed Decision entitled Conclusion of Law, which stated: "The requirements for On-Sale General-Special License are governed in part by Business and Professions Code Section 23399.2 and 23037. Respondent [appellant on appeal] is not in compliance with the legal requirements herein in his operations as a licensee holding a 'club' license." No reference was made to these two sections in the Accusation. The Department did not mention these sections at the hearing before the ALJ until the closing argument [RT 84, 88].

Section 23399.2 provides for the issuance of Special On-Sale General licenses and requires that a premises so licensed must be operated as a club meeting the requirements of §23037 (with certain exceptions). Section 23037 defines "club" and "guest." Section 23431 permits club licensees to sell alcoholic beverages only to members and their guests. Section 23804 deals with violations of conditions on a license.

We find no merit in this contention. As the Department points out, the two sections in question are basically definitional. There was no allegation that there were violations of these sections and it does not appear that the Department is arguing that

⁶The text of these statutes is set out in the appendix.

there were. The Department is merely pointing out the sections that define terms used in the statutes that were violated.

III

Appellant contends that a suspension for 20 days, with 10 days stayed for a probationary period of one year, is excessive.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Appellant argues that one of the conditions of its license required it not to discriminate so as to exclude anyone because of race, color, creed, or sex. Therefore, appellant states, "All persons who entered the Probe were members." (App. Opening Brief at 14.) Appellant concludes that it thereby complied with the conditions on its license and should not be penalized for that by a suspension. Appellant suggests that the penalty be reduced so that it may pay a fine in lieu of suspension.

The Department points out that appellant was disciplined for a similar offense before, and that this is a violation of a fundamental aspect of this type of license.

Appellant basically admits that it has no requirement for "membership" other than payment of a fee at the door, but seems to at least insinuate that it would be unable to comply with the non-discrimination condition on its license if it didn't admit

everyone who could pay. This is specious reasoning that merits no discussion. It may be that appellant is feeling constricted by its club status, but, as the Department notes, if that is the case, appellant should try to get another type of license, not violate the provisions of its present one. The penalty imposed here is well within the bounds of the Department's discretion.

CONCLUSION

The decision of the Department is affirmed.⁷

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁷This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.

Business and Professions Code §23037 provides:

“‘Club’ means a corporation or association which is the owner, lessee, or occupant of an establishment operated solely for objects of a social or athletic nature but not for pecuniary gain, having a bona fide membership list, and the majority of the members of which pay dues at least once in every year, and the property as well as the advantages of which belong to the members, and which sells alcoholic beverages only to its members and its bona fide guests. A guest is defined as a person who is actually a houseguest, or a person whose presence as a guest is in response to a specific invitation for the special occasion.”

Business and Professions Code § 23399.2 provides:

“Premises for which a special on-sale general license is issued may be operated only as a club by an organization which meets all the requirements of Section 23037, or by an organization which meets all of such requirements except that it is operated for pecuniary gain, or its property is not owned by its members, or both.”

Business and Professions Code § 23431 provides:

“The holder of a club license may exercise all of the rights and privileges permitted by an on-sale general license but may sell and serve alcoholic beverages for consumption within the licensed establishment only to bona fide members of the club and their bona fide guests. A club license is not transferable from person to person. The provisions of Article 2 of Chapter 5 of this division do not apply to the issuance of club licenses.”

Business & Professions Code §23804 provides:

“A violation of a condition placed upon a license pursuant to this article shall constitute the exercising of a privilege or the performing of an act for which a license is required without the authority thereof and shall be grounds for the suspension or revocation of such license.”

Government Code § 11503 provides:

“A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statute and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules. The accusation shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

